Institut Akauntan Malaysia & Anor v Nagarajan a/l Thambilah

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-750-04/2022
YAACOB MD SAM, SEE MEE CHUN AND AZIMAH OMAR JJCA
23 OCTOBER 2023

Civil Procedure — Judicial review — Application for — Appeal against High Court's decision in allowing judicial review application by respondent — Second appellant found respondent guilty of charges of unprofessional conduct — Whether there was inordinate and inexcusable delay on part of Practice Review Committee in lodging complaint — Whether failure of follow-up review report to refer to first review report was procedural impropriety

This was an appeal against the decision of the High Court ('HC') which granted an order of certiorari to quash the decision of the Disciplinary Appeal Board ie the second appellant in finding the respondent guilty of the charges of unprofessional conduct and the consequential punishment. The respondent was an accountant and auditor who practiced under the name and style of Messrs Kumpulan Naga ('the firm'). On 11 December 2012, the Registrar of the first appellant received a complaint ('the complaint') from the chairman of the Practice Review Committee ('PRC') against the respondent. The complaint was for failing to maintain, observe or apply the expected professional standards under para 42 of Appendix VI to the first appellant's By-Laws (On Professional Ethics, Conduct and Practice) 2007 ('the By-Laws'). The complaint was based on a review conducted on the firm from 6–9 March 2016. A report known as the first review report ('FRR') dated 29 November 2016 was prepared and issued to the respondent. On 4–7 May 2019 and 11 May 2019, a follow up review was conducted on the firm to ascertain if the respondent had undertaken the corrective measures highlighted in the FRR. A follow-up review report ('FURR') dated 6 April 2011 was prepared and brought before the PRC. The PRC concluded that the firm had failed to maintain, observe or apply the expected professional standards in his audit work. A copy of the FURR was sent to the respondent. The Registrar then issued a formal notice of complaint dated 18 February 2013 to the respondent. The Investigation Committee ('IC') referred the matter to the Disciplinary Committee ('DC') after hearing the written and oral representations of the respondent. This was communicated to the respondent by letter dated 4 June 2015. A charge was also made out against the respondent on 13 July 2015. On 26 May 2019, the DC decided that the respondent had committed an act amounting to unprofessional conduct. The respondent appealed to the second respondent but was dismissed and formed the subject matter of the judicial review application to the HC. The grounds of the HC in quashing the decision

of the second appellant were inordinate and inexcusable delay on the part of the PRC in lodging the complaint and the failure of the FURR to refer to the FRR. Hence, this appeal.

Held, dismissing the appeal:

(1) The delay from the FRR to the follow-up review and from the FRR to the FURR and compounded by the delay of the conduct of the first review to the complaint, which in turn led to the delay in the lodging of the complaint, could not be said to be reasonable. The appellants' contention that the issue of delay on the part of PRC in lodging the complaint was not raised, was not tenable given that the delay from one event to another would have an impact on the subsequent events. Further, the appellants had acknowledged that the time lapse between the FRR and FURR was raised (see paras 32–33).

(2) Although para 42 of Appendix VI of the By-Laws did not expressly require the FURR to refer to the FRR, this did not end the matter. A perusal of the complaint would show a nexus between the FRR to the FURR. Next, the formal notice of complaint in para b also referred to a first review. The charge itself also referred to the first review. A reading of paras 40 and 42 of Appendix VI of the By-Laws would show that a complaint could only be formed where the PRC had not been satisfied that the FRR findings had been complied thereby warranting the follow-up review. Further, if there was no reference to the FRR, how would the member know whether the steps taken since the first review had resulted in an improvement. Therefore, the failure of the FURR to refer to the FRR which formed the basis of the complaint was procedural impropriety (see paras 38–41, 43 & 46–47).

(3) The decision of the second appellant could be quashed for procedural impropriety for breach of the By-Laws and the delay which had prejudiced the respondent from the IC stage and in having an action hanging over him (see para 52).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi ('MT') yang memberikan perintah certiorari untuk membatalkan keputusan Lembaga Rayuan Tatatertib iaitu perayu kedua dalam mendapati responden bersalah atas tuduhan berkelakuan tidak profesional dan hukuman berbangkit. Responden adalah seorang akauntan dan juruaudit yang berlatih di bawah nama dan gaya Tetuan Kumpulan Naga ('firma'). Pada 11 Disember 2012, Pendaftar perayu pertama menerima aduan ('aduan') daripada pengerusi Jawatankuasa Semakan Amalan ('JSA') terhadap responden. Aduan itu adalah kerana gagal mengekalkan, mematuhi atau menggunakan piawaian profesional yang dijangka di bawah perenggan 42 Lampiran VI kepada By-Laws (On

Professional Ethics, Conduct and Practice) 2007 ('By-Laws') perayu pertama. Aduan itu berdasarkan semakan yang dijalankan ke atas firma itu dari 6 hingga 9 Mac 2016. Laporan yang dikenali sebagai laporan semakan pertama ('LSP') bertarikh 29 November 2016 telah disediakan dan dikeluarkan kepada responden. Pada 4–7 Mei 2019 dan 11 Mei 2019, semakan susulan telah dijalankan ke atas firma untuk memastikan sama ada responden telah melakukan langkah pembetulan yang diketengahkan dalam LSP. Laporan semakan susulan ('LSS') bertarikh 6 April 2011 telah disediakan dan dibawa ke RRC. JSA membuat kesimpulan bahawa firma itu telah gagal mengekalkan, mematuhi atau menggunakan piawaian profesional yang dijangka dalam kerja auditnya. Salinan LSS telah dihantar kepada responden. Pendaftar kemudiannya mengeluarkan notis aduan rasmi bertarikh 18 Februari 2013 kepada responden. Jawatankuasa Penyiasatan ('JP') merujuk perkara itu kepada Jawatankuasa Tatatertib ('JT') selepas mendengar representasi bertulis dan lisan responden. Perkara ini telah dimaklumkan kepada responden melalui surat bertarikh 4 Jun 2015. Pertuduhan juga telah dibuat terhadap responden pada 13 Julai 2015. Pada 26 Mei 2019, JT memutuskan bahawa responden telah melakukan perbuatan yang merupakan perbuatan tidak profesional. Responden merayu kepada responden kedua tetapi telah ditolak dan membentuk perkara permohonan semakan kehakiman kepada MT. Alasan MT untuk membatalkan keputusan perayu kedua adalah kelewatan yang melampau dan tidak boleh dimaafkan di pihak JSA dalam membuat aduan dan kegagalan LSS untuk merujuk kepada LSP. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan:

(1) Kelewatan daripada LSP kepada semakan susulan dan daripada LSP kepada LSS dan ditambah lagi dengan kelewatan pelaksanaan semakan pertama kepada aduan, yang seterusnya menyebabkan kelewatan dalam membuat aduan, tidak boleh dikatakan munasabah. Pendapat perayu bahawa isu kelewatan di pihak JSA dalam membuat aduan tidak dibangkitkan, tidak dapat dipertahankan memandangkan kelewatan dari satu peristiwa ke peristiwa yang lain akan memberi kesan kepada peristiwa berikutnya. Selanjutnya, perayu-perayu telah mengakui bahawa tempoh masa antara LSP dan LSS telah dibangkitkan (lihat perenggan 32–33).

(2) Walaupun perenggan 42 Lampiran VI By-Laws tidak secara jelas menghendaki LSS merujuk kepada LSP, ini tidak menamatkan perkara itu. Penelitian aduan akan menunjukkan perkaitan antara LSP dengan LSS. Seterusnya, notis aduan rasmi di perenggan b juga merujuk kepada semakan pertama. Pertuduhan itu sendiri juga merujuk kepada semakan pertama. Pembacaan perenggan 40 dan 42 Lampiran VI By-Laws akan menunjukkan bahawa aduan hanya boleh dibuat apabila JSA tidak berpuas hati bahawa penemuan LSP telah dipatuhi justeru memerlukan semakan susulan. Selanjutnya, jika tiada rujukan kepada LSP,

bagaimanakah ahli itu tahu sama ada langkah yang diambil sejak semakan pertama telah menghasilkan peningkatan. Oleh itu, kegagalan LSS merujuk kepada LSP yang menjadi asas aduan adalah ketidakwajaran prosedur (lihat perenggan 38–41, 43 & 46–47).

(3) Keputusan perayu kedua boleh dibatalkan kerana ketidakwajaran prosedur bagi pelanggaran By-Laws dan kelewatan yang telah memprejudis responden dari peringkat JP dan mempunyai tindakan tergantung ke atasnya (lihat perenggan 52).]

Cases referred to

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149, FC (refd)
Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443, FC (refd)

Legislation referred to

Accountants Act 1967 ss 6(c), 19, 20, 20(1), 21

Appeal from: *Nagarajan a/l Thambiah v Institut Akauntan Malaysia & Anor* [2022] MLJU 1096 (High Court, Kuala Lumpur)

Shaikh Abdul Salem (with Mah Dick Son) (Shaikh David & Co) for the appellants.
Jeramal Ganesan a/l Muthu (J Ganesan Tajul Anuar & Co) for the respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court ('HC') which granted an order of certiorari to quash the decision of the second appellant which is the Disciplinary Appeal Board ('DAB') in finding the respondent guilty of the charges of unprofessional conduct and the consequential punishment.

PARTIES

[2] The first appellant is the Malaysian Institute of Accountants ('MIA') incorporated under the Accountants Act 1967 ('the Act') to, inter alia, regulate the practice of the profession of accountancy in Malaysia (s 6(c)). Section 19 of the Act empowers the appointment of an Investigation Committee ('IC'), a Disciplinary Committee and a DAB with the functions as spelled out in ss 20 and 21.

A **[3]** The respondent is an accountant and auditor who practices in the name and style of Messrs Kumpulan Naga ('the firm').

BACKGROUND FACTS

B **[4]** On 11 December 2012, the Registrar of MIA received a complaint ('the complaint') from the chairman of the Practice Review Committee ('PRC') against the respondent. The complaint was for failing to maintain, observe or apply the expected professional standards under para 42 of Appendix VI to MIA's By-Laws (On Professional Ethics, Conduct and Practice) 2007 ('the C By-Laws').

[5] The complaint was based on a review conducted on the firm on 6–9 March 2006 with an exit meeting next held. A report known as the first D review report ('FRR') dated 29 November 2016 was prepared and issued to the respondent who denied having received it.

[6] On 4–7 May 2019 and 11 May 2019, a follow up review was conducted on the firm to ascertain if the respondent had undertaken the corrective E measures highlighted in the FRR. A closing meeting was held.

[7] A follow-up review report ('FURR') dated 6 April 2011 was prepared and brought before the PRC. The PRC concluded that the firm had failed to maintain, observe or apply the expected professional standards in his audit F work. A copy of the FURR was sent to the respondent.

[8] The registrar then issued a formal notice of complaint ('the notice') dated 18 February 2013 to the respondent (encl 17/79-80). By the notice, it was stated the respondent may have breached ss 550.1 and 550.2 of the G By-Laws dealing with quality assurance and s 150.1 of the By-Laws dealing with Professional Behaviour. These deal, respectively, with the alleged failure of the firm to adopt and apply policies and procedures designed to maintain adherence to professional standards and the obligations to avoid any action H that may bring discredit to the profession.

[9] Under s 20(1) of the Act, the IC shall investigate any complaints made. Having heard the written and oral representations of the respondent, the IC decided to refer the matter to the DC. This was communicated to the I respondent by letter dated 4 June 2015 that he had a case to answer in respect of a contravention of the By-Laws. A charge was also made out against the respondent on 13 July 2015.

[10] On 26 May 2019, the DC decided that the respondent had committed an act amounting to unprofessional conduct. The DC imposed the following punishment:

(a) an imposition of a fine RM5,000;

(b) the respondent was to MIA RM25,082.40 in respect of costs and expenses incidental to the disciplinary hearing before the DC and the investigation conducted by the IC; and

(c) the respondent was directed to attend a course on the Audit Quality Enhancement Programme conducted by MIA within one year from the decision date.

[11] Whereupon, on 5 July 2019, the respondent appealed to the DAB. On 25 June 2020, the DAB dismissed the appeal and affirmed the decision of the DAB which formed the subject matter of the judicial review application to the HC.

[12] We note too that the respondent had in the course of the IC and DC raised issues on the service of the FRR, the request for a second hearing before the IC which was denied, unsigned FRR in the complaint and time taken by the IC to refer to the DC. There was also a preliminary objection raised before the DAB which was dismissed.

DECISION OF THE HC

[13] As stated at the very beginning, the HC had quashed the decision of the DAB. The grounds of judgment of the HC ('GOJ') can be found in encl 4/39–51.

[14] The HC noted the timeline from the first review conducted to the time of the notice of complaint. This was set out in para 23 as follows:

	Event	Date	Time Taken
1.	The first review conducted	6 March 2006	
2.	The FRR prepared	29 November 2006	eight months
3.	The follow up review conducted	4 May 2010	3 1/2 years
4.	The FURR prepared	6 November 2011	1 1/2 years from the follow up review
5.	The complaint by PRC	11 December 2012	one year from FURR

	Event	Date	Time Taken
6.	The notice of complaint issued	18 February 2013	two months

[15] We note that the date the FURR was prepared should be 6 April 2011 and not 6 November 2011. This is evident from the appellants' reference to the FURR as in '104–105 CCB (Vol 2A)' which corresponds to encl 17/77–78 where the date is stated to be 6 April 2011. This does not detract from the length of time it took for the FURR to be prepared. Other than this, the dates for the other events remain.

[16] In paras 24 and 25, the HC said it was apparent the PRC took 3 1/2 years from the FRR to the follow up review with another one year from the FURR for the complaint to be lodged.

[17] In paras 26 and 27 it was then stated:

> [26] What is glaring is that the applicant was allowed to practice in the meantime. This is so when in the complaint form, the then Chairman of the PRC states as follows:
>
> > During the closing meeting on 11 May 2010, the practice review managers had briefly communicated with the member that the failure to show satisfactory improvements from the previous review may lead to disciplinary action being taken against the firm and may have serious consequential action on the partner's practising certificate as well as his application for renewal of audit license.
> >
> > I can only imagine that with this kind of damning observation, the PRC would have moved in a fast and furious manner to nip the 'fundamental deficiencies' and the applicant's 'system of quality control' in the bud.
>
> [27] Unfortunately, no immediate action was taken by the PRC.

[18] The implication of the delay would have prejudiced the respondent in the defence at the IC and that after the FURR, the allegation should not be hanging over his head (para 29 of GOJ).

[19] The HC next considered that the FRR did not refer to what had happened since it was prepared and whether any remedial action had been taken. The appellant's response had been that 'there is no requirement in the By-Laws to make any reference to the FRR (or any report) in preparing the FURR' (para 24 of affidavit-in-reply).

[20] Such a reasoning was not tenable to the HC for the reasons given in paras 35 and 36, namely:

[35] ... First, the idea of the review exercise is not primarily meant to punish the members. It is more educative in nature. It is to ensure that all members who are in public practice comply with all applicable professional standards, legal and regulatory requirements in the performance of their work; see B250.3 of the Institute By-Laws.

[36] Secondly, the FURR must have referred to what action had been taken, or not taken, by the member about the FRR. If there is no reference made, how else could a member improve its quality control system? How else could a member know whether his or her system had improved since the last review? In any event, s 42 of Appendix VI makes it incumbent for a member to comply with a direction given by the PRC.

[21] The findings of the HC are in para 38 as follows:

[38] In the result, my findings would be as follows:

(a) the inordinate and inexcusable delay on the part of the PRC in lodging the complaint, as highlighted by the applicant in his AIS-3, had given rise to a substantial risk that a fair inquiry would not be possible. It had caused serious prejudice to the applicant in the preparation of his defence before the IC and the DC;

(b) in view of the unexplained delay, one can be forgiven for concluding that the delay was deliberate or otherwise wilful, as seen in *TM Feroze Khan*;

(c) the failure of the FURR to refer to the FRR, which formed the basis of the complaint against the applicant, is tainted with procedural impropriety in that it was a clear breach of s 42 of Appendix VI of the Institute's By-Laws.

[22] These were termed as procedural impropriety where there was a failure on the part of the administrative tribunal to observe procedural rules that are expressly laid out.

OUR DECISION

[23] We do not intend to set out the respective submissions of the parties separately, but will where necessary, address them in the course of the decision.

[24] The two grounds of the HC in quashing the decision of the DAB were inordinate and inexcusable delay on the part of the PRC in lodging the complaint and the failure of the FURR to refer to the FRR.

DELAY

[25] The overall delay from the time of the first review, the follow up review, the FURR, the IC, the DC and the DAB were raised. This necessarily entails the delay of the complaint lodged by the PRC. Here the delay is from the time

of the first review conducted on 6 March 2006 to the complaint of the PRC on 11 December 2013, a good seven years plus.

[26] The other issue on delay was the time lapse between the FRR and FURR. It is not disputed that the PRC took 3 1/2 years from the FRR (29 November 2006) to conduct the follow up review (May 2010). The FURR was then prepared on 6 April 2011 (encl 17/76). This would make it about four years four months from the FRR to the FURR.

[27] In this regard, para 37 of Appendix VII to the By-Laws only prescribes the follow up review to commence not earlier than 12 months after the first review. It provides as follows:

> Follow-up action
>
> 37. On receiving the report from a reviewer, the Committee, having regard to the report and any submissions or representations attached to it, may:
>
> (a) make recommendation to the member firm concerned, regarding its application or observance of (or lack thereof) professional standards;
>
> (b) (i) issue an instruction to a reviewer to carry out, within such period as may be specified in the instruction (which period shall not commence earlier than twelve (12) months after the date on which the instruction is issued), a further practice review as regards the member firm to which the report relates, and
>
> (ii) specify in the instruction, the matters as regards which the review is to be carried out;

[28] The question arises whether the period of 3 1/2 years from the FRR to conduct the follow up review and the four years four months from the FRR to the FURR are reasonable.

[29] The evidence of the complainant Dato Johan Idris (the chairman of PRC at the material time) at the DC was that they give a 'minimum of 18 months so it can be longer than 18 months' and 'we believe 18 months is sufficient time for the firm to rectify'. He further stated four years two months is good 'because at least you got more time to rectify'. He disagreed that the time line was extremely unreasonable.

[30] The evidence can be found in encl 17/338–339 as follows:

Dato Johan Idris	Oh … you are talking about the 18 months and review all up review. That's the minimum that we can …
En Ahmad	Usually we give a minimum of 18 months.
Dato Johan Idris	Yes minimum of 18 months, so it can be longer than 18 months.

Mr Ganesan	Where does it says it is minimum 18 months and longer can be anything?
Dato Johan Idris	Just say we will do a Follow-up Review by 18 months it could be longer, it was not shorter because what's the whole purpose of Practice Review is that if we have findings, we need firm to rectify so we believe 18 months is sufficient time for the firm rectify. So if the firm cannot ratify by 18 months, because MIA also have resources to review, the have many things to look at. So they may take two years, they may take three years and it could be longer. But at minimum is 18 months, so there no ... nothing to say especially it must be done within 18 months but minimum for firm to rectify is 18 months.
Mr Ganesan	Alright. You agree with me that period of the ... 4 years 2 months is extremely long period?
Dato Johan Idris	4 years 2 months then it is good, because at least you got more time to rectify.
	...
Mr Ganesan	... Dato Johan I will submit on it later for the actual period what is reasonable and unreasonable. I put it to you Mr Johan, Dato' Johan that your contention that you can conduct the further review any time after 1 1/2 years, and you have conducted 4 years 2 months later is extremely unreasonable. Do you agree or disagree?
Dato Johan Idris	I disagree ... If you say we conduct the review earlier than I agree, if conduct the review later I disagree because the whole purpose of the review is to give the firm a time for them to rectify themselves, like any other firms certain things needs time and the time minimum is required. So if we come in and review let say 6 months, it is not fair for the firm because the firm needs time. But if we give you 4 years to rectify and you have not rectified then I think so MIA has given the firm such a time. Let me be clear during the Practice Review, when we review no names of the firm being mentioned. I don't know who being reviewed ... which client. So we do our work objectively and independently based on the submission being submitted by the MIA review team.

Note: Ahmad refers to a member of the DC and Mr Ganesan is the lawyer for the respondent.

[31] The HC considered the delay by essentially stating that if the shortcomings complained of were so serious, the PRC would have moved in a fast and furious manner but yet no immediate action was taken and the Respondent was allowed to practice. We agree with the HC.

[32] We find that under the circumstances of the case, the delay from the FRR to the follow up review and from the FRR to the FURR and compounded by the delay from the conduct of the first review to the complaint, which in turn led to the delay in the lodging of the complaint, cannot be said to be reasonable.

[33] It was contended by the appellants that the issue of delay on the part of PRC in lodging the complaint was not raised. We find this not tenable given that the delay from one event to another would have an impact on the subsequent events. This means that if there was a delay from the FRR to the FURR, it would necessarily lead to the delay in the complaint being lodged. Further, the appellants had acknowledged that the time lapse between the FRR and FURR was raised.

[34] We note that in para 39 of the affidavit-in-support (encl 5/24), the respondent had referred to the length of time it took for the PRC to lodge the complaint for investigation.

[35] The HC could not find any explanation for what was termed as inordinate delay in filing the complaint. Under the circumstances, we agree with the finding in para 31 of the GOJ as follows:

> [31] In my view, the unexplained delay in the lodging of the complaint had prejudiced the applicant and denied him a fair trial. In *TM Feroze Khan Ors v Meera Hussain bin TM Mohamed Mydin* [1997] 3 MLJ 800; [1997] 4 CLJ 710 (CA) Shaik Daud JCA, in delivering the judgment of the Court of Appeal, remarked as follows:
>
> > There is, therefore, no doubt there was this long delay, and a deliberate one at that. It only remains for consideration whether such delay has prejudiced the respondent. In our view it undoubtedly has. There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial (see *Hongkong Bank (M) Bhd v Raja Letchumi a/p Ramarajoo* [1996] 2 MLJ 34; [1996] 4 CLJ 155; [1996] 2 AMR 34).

FRR NOT BEING REFERRED TO IN THE FURR

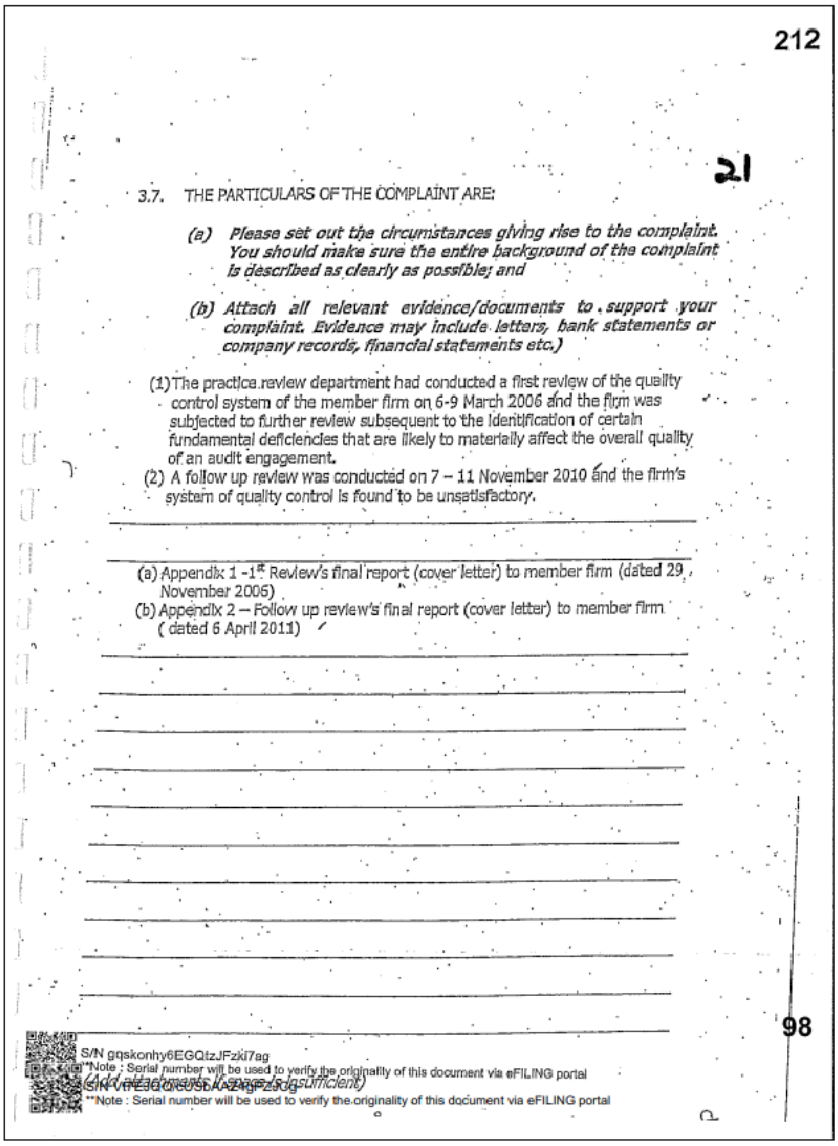
[36] The HC said the failure of the FURR to refer to the FRR which formed the basis of the complaint was tainted with procedural impropriety in that it was a clear breach of para 42 of Appendix VII to the By-Laws.

[37] The applicable review procedure is provided in Appendix VII to the By-Laws. The relevant provision is para 42. For context, paras 40 and 42 are set out as follows:

> 40. A follow up review will be required where the member firm has not satisfied the Practice Review Committee that all the key control objectives have been maintained and where the deficiencies are likely to materially affect the overall quality of an audit engagements. In such cases the Practice Review Committee will also make recommendations, which it expects the member firm to implement in order to ensure the maintenance of professional standards. The Implementation of the recommendation will be examined during the follow up review.
>
> ...
>
> 42. The Practice Review Committee will, even on a first review, make complaint against a member where the weakness in the performance of audit engagements, or the disregard of professional standards amounts to, in its opinion, unprofessional conduct within the meaning prescribed pursuant to Rule 2 of the Malaysian Institute of Accountants (Disciplinary) (No 2) Rules 2002. In subsequent reviews, the Practice Review Committee can make a complaint where it is of the opinion that the member has failed (or has shown no credible intention) to maintain, observe or apply the professional standards as expected of him or her.

[38] It will be immediately apparent that para 42 of Appendix VII to the By-Laws does not expressly require the FURR to refer to the FRR. However, this does not end the matter.

[39] We find that a perusal of the complaint (encl 17/64–74) would show a nexus between the FRR to the FURR. This is evident from para 3.7 relating to particulars of the complaint, para 3.8 relating to the allegations and para 3.9 on the documents to support the allegations. We reproduce these references as below:



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3.7. THE PARTICULARS OF THE COMPLAINT ARE:

(a) Please set out the circumstances giving rise to the complaint. You should make sure the entire background of the complaint is described as clearly as possible; and

(b) Attach all relevant evidence/documents to support your complaint. Evidence may include letters, bank statements or company records, financial statements etc.)

(1) The practice review department had conducted a first review of the quality control system of the member firm on 6-9 March 2006 and the firm was subjected to further review subsequent to the identification of certain fundamental deficiencies that are likely to materially affect the overall quality of an audit engagement.

(2) A follow up review was conducted on 7 – 11 November 2010 and the firm's system of quality control is found to be unsatisfactory.

(a) Appendix 1 -1st Review's final report (cover letter) to member firm (dated 29 November 2006)

(b) Appendix 2 – Follow up review's final report (cover letter) to member firm (dated 6 April 2011)

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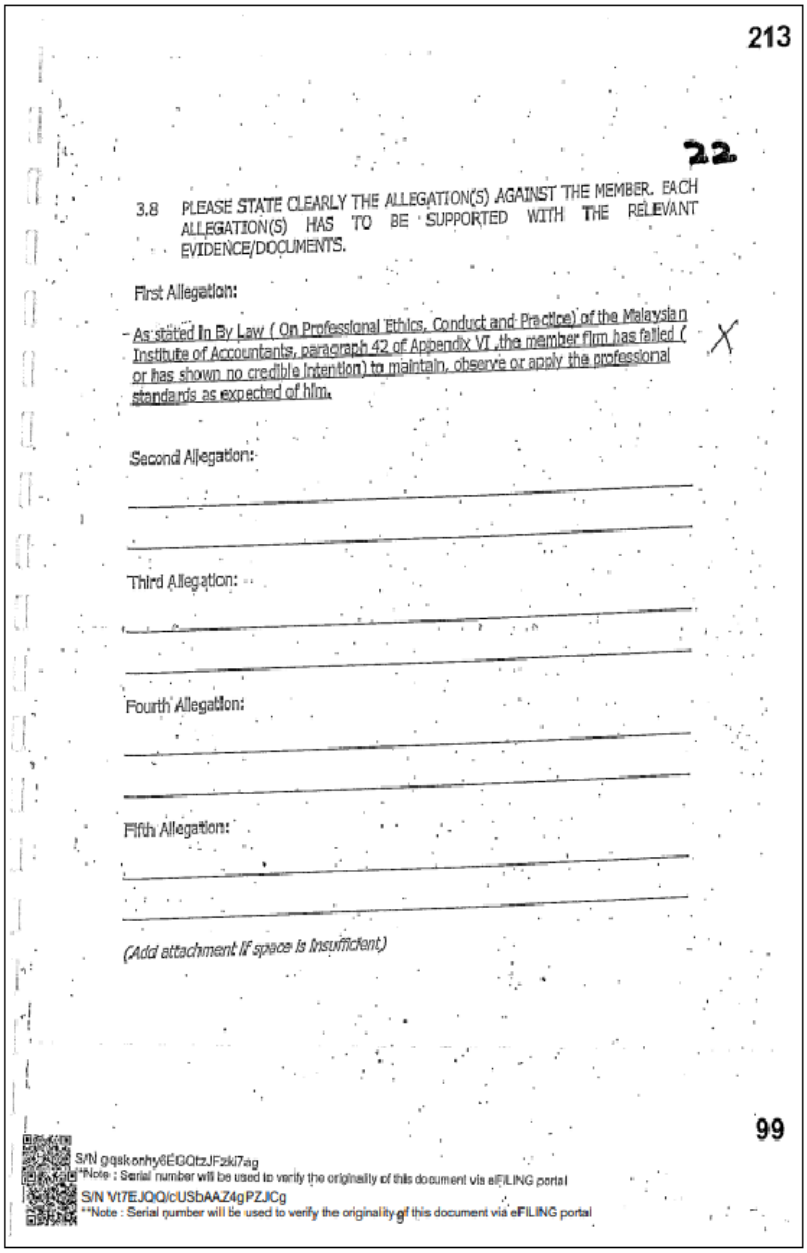

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3.8 PLEASE STATE CLEARLY THE ALLEGATION(S) AGAINST THE MEMBER. EACH ALLEGATION(S) HAS TO BE SUPPORTED WITH THE RELEVANT EVIDENCE/DOCUMENTS.

First Allegation:

- As stated in By Law (On Professional Ethics, Conduct and Practice) of the Malaysian Institute of Accountants, paragraph 42 of Appendix VI ,the member firm has failed (or has shown no credible intention) to maintain, observe or apply the professional standards as expected of him. X

Second Allegation:

Third Allegation:

Fourth Allegation:

Fifth Allegation:

(Add attachment if space is insufficient)

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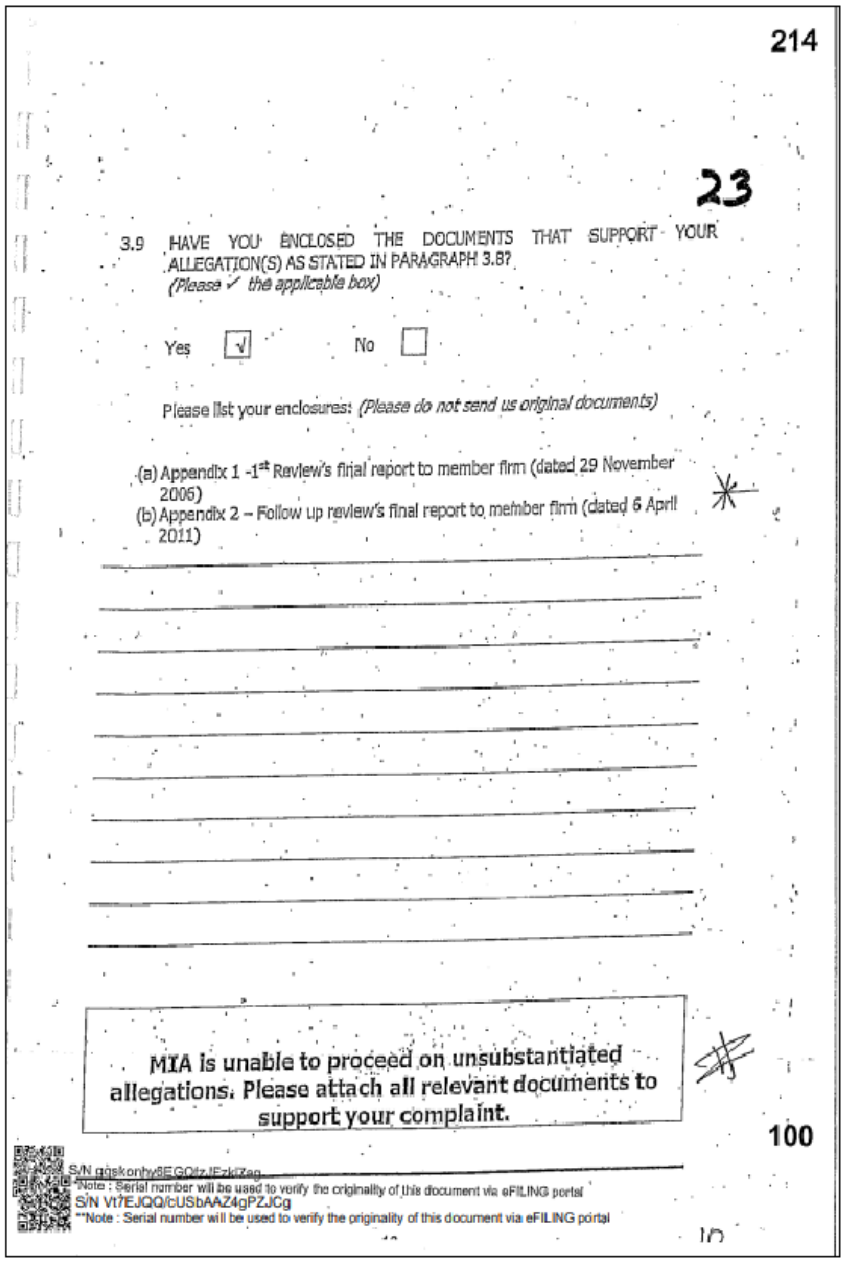

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3.9 HAVE YOU ENCLOSED THE DOCUMENTS THAT SUPPORT YOUR ALLEGATION(S) AS STATED IN PARAGRAPH 3.8?
(Please ✓ the applicable box)

Yes [√] No [ ]

Please list your enclosures: *(Please do not send us original documents)*

(a) Appendix 1 -1st Review's finial report to member firm (dated 29 November 2006)
(b) Appendix 2 – Follow up review's final report to member firm (dated 6 April 2011)

MIA is unable to proceed on unsubstantiated allegations. Please attach all relevant documents to support your complaint.

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[40] Next comes the formal notice of complaint dated 18 February 2013 (encl 17/79–80) where para b refers to a first review. We set out the aforesaid paragraph:

b. your firm had been reviewed by the Institute's practice review team from 6 March 2006 to 9 March 2006 ('1st Review') and from 4 May 2010 and 11 May 2010 ('Follow up Review')'; and ...

[41] The charge itself dated 13 July 2015 (encl 17/157–159) also refers to the 'first review'. The first paragraph of the charge states:

THAT you, Mr Nagarajan S/O Thambilah (Mem No 1565), are the sole proprietor of Kumpulan Naga (AF:0024) ('the firm'). The firm has been selected for review under the Practice Review Program pursuant to Section 550.3 of the By-Laws (on Professional Ethics, Conduct and Practice) of the Malaysian Institute of Accountants (issued January 2007) (hereinafter referred to as 'the Institute's By Laws') on 6 March 2006 to 9 March 2006 ('First Review') and from 4 May 2010 to 7 May 2010 and 11 May 2010 ('Follow up Review') at the above mentioned address. The firm had been rated as 'unsatisfactory' upon the completion of the Follow up Review as indicated in the Follow up Review Report ('FURR') dated 6 April 2011 which detailed the weakness in the audit work performed.

[42] Paragraph 40 of Appendix VII to the By-Laws provides a follow up review will be required where the member has not satisfied the PRC that all key control objectives have been maintained, where recommendations are made and the implementation of the recommendations will be examined during the follow up review. Paragraph 42 further provides the PRC can make a complaint where the member has failed to maintain, observe or apply the professional standards expected.

[43] A reading of the two paragraphs would show that a complaint can only be formed where the PRC has not been satisfied that the FRR findings have been complied thereby warranting the follow up review. This is evident from the complaint, the notice of complaint and the charge, all of which have referred to the first review.

[44] Dato Johan Idris's evidence was as follows in encl 17/340:

Mr Ganesan	So the Further Review Report is ... what is the purpose of it to ensure that the First Review Report findings are observed, am I right? Is it true?
Dato Johan Idris	Yup. The Further Review Report is to look at whether you have rectified based on the review they have done whether you have rectify or no rectify or is there any new findings that has not been identified during the First Review towards the Second Review. That's why we have the comparison between the First Review and the Second Review to make a Decision.

[45] We are mindful that para 42 of Appendix VII to the By-Laws does not exclude a complaint to be made even on a first review. This does not however apply in the facts of the appeal where the complaint was lodged after the FURR.

[46] As rightly considered by the HC, if there is no reference to the FRR, how would the member know whether the steps taken since the first review had resulted in an improvement.

[47] Viewed in the light of the above, we agree that the failure of the FURR to refer to the FRR was a procedural impropriety where the FRR formed the basis of the complaint.

[48] With regard to the respondent being aware of the contents of the FRR during the first review in 2006 as he had concurred with the weaknesses highlighted by the PRC and during the second review in 2010 he highlighted he had taken measures to address most of the major weaknesses commented by the PRC team in the first review, this has been explained in the respondent's rebuttal affidavit dated 27 April 2021 (para 20(a), encl 5/102–103) that he was referring to the exit meeting after the first review meeting.

GROUNDS FOR JUDICIAL REVIEW AND APPELLATE INTERVENTION

[49] We now refer to the appellants' own authorities that would in fact support the respondent's position.

[50] The first is *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443 where at p 464 this was said:

> [60] This landmark decision moved the courts from a position of deciding whether prerogative power existed to deciding if they were being carried out lawfully. Lord Diplock in his speech at p 401D of the GCHQ case enunciated three classic grounds for judicial review:
>
> > Judicial review has I think developed to a stage today when ... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety ...
>
> ...
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe

procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

[51] The second is *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149 where at pp 165–166, the court noted the following:

> [36] The courts have very limited review powers over administrative determinations of public bodies and are constrained to confirm the findings in disciplinary hearings. The courts will only intervene in disciplinary cases where there was a fundamental procedural flaw. The courts cannot exceed its role in cases of this genre as the instant appeal. The courts cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence. Weighing and assessing the evidence is the function of the disciplinary authority which is the body to which the legislature has entrusted the responsibility of deciding the issue, and not the courts. Hence, the court should approach cases of this genre as the instant appeal in the following way, namely, whether there has been an error in the process or whether there was procedural irregularity in the decision making proceedings leading to the public officer's dismissal.

[52] The decision of the DAB can thus be quashed for procedural impropriety for breach of the By-Laws and the delay which has prejudiced the respondent from the IC stage and in having an action hanging over him. The court should only move to do so where there was a fundamental procedural flaw.

CONCLUSION

[53] We therefore find no error committed by the HC to warrant appellate intervention. The appeal is dismissed with RM10,000 costs to the respondent subject to allocatur.

Appeal dismissed.

Reported by Ahmad Ismail